SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 30 1974

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1643

COLGATE W. DARDEN, III, *Petitioner,*

v.

ELIZABETH J. WITHAM; BLATT, FALES, PEEPLES, BEDINGFIELD & LOADHOLT; HENDERSON, SALLEY BODENHEIMER & LYNN; CLEO J. SCOTT, Clerk of the Court of Common Pleas for Aiken County, S.C.; HONORABLE J. B. NESS, Presiding Judge, Second Judicial Circuit; FRANCES SMITH, Clerk of the Supreme Court of South Carolina, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals in the above-entitled case.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the District of South Carolina, unreported, is printed in Appendix A, *infra,* p. 1a. The opinion of the United

States Court of Appeals for the Fourth Circuit, unreported, is printed in Appendix B, *infra*, p. 11a.

Relevant portions of the opinion of the Court of Common Pleas for Aiken County, South Carolina, July 15, 1971, unreported, are printed in Appendix C, *infra*, p. 12a. Relevant portions of the opinion of the Court of Common Pleas for Aiken County, November 11, 1972, unreported, are printed in Appendix D, *infra*, p. 13a.

QUESTIONS PRESENTED

Petitioner filed suit in federal district court challenging the constitutionality of a state statute authorizing divorce courts to award attorneys' fees to wives but not to husbands, and alleging that he had no state remedy because a state court had refused to consider his constitutional claim. The district court nonetheless dismissed the complaint outright and the court of appeals affirmed the dismissal. In these circumstances petitioner believes the following questions are presented:

(1) Where serious federal constitutional issues were raised and were not rebutted, and where the inadequacy of the state forum was specifically alleged, did the district court err in dismissing the complaint outright, rather than retaining jurisdiction pending the final outcome of state proceedings?

(2) Even if a district court has discretion to abstain pending state court proceedings where a serious constitutional challenge to a state statute is raised, can this discretion be exercised without convening a three-judge district court?

JURISDICTION

1. This action was filed January 24, 1973, in the United States District Court for the District of South Carolina. Jurisdiction was based on 28 U.S.C §§ 1331, 1343(3), and 1343(4) for relief pursuant to 42 U.S.C. §§ 1981 *et seq.*, 28 U.S.C. §§ 2201 and 2284, and the Fourteenth Amendment to the United States Constitution. The opinion of the district court dismissing the action was filed June 15, 1973.

2. The judgment of the United States Court of Appeals for the Fourth Circuit, affirming the district court, was entered on January 31, 1974.

3. Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment Fourteen, provides in part as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

South Carolina Code of Laws, Annotated, 1962, as amended, Section 20-112:

> In every action for divorce from the bonds of matrimony, the wife, whether she be plaintiff or defendant, may in her complaint or answer or by petition pray for the allowance to her of alimony and suit money and for the allowance of such alimony and suit money pendente lite. If such claim shall appear well founded the Court shall allow a reasonable sum therefore.

United States Code, Title 28, Section 2281:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting

under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

STATEMENT

Petitioner seeks review of the judgment of the court of appeals affirming the district court's dismissal of petitioner's complaint for failure to state a claim upon which relief can be granted. Petitioner's complaint, brought pursuant to 42 U.S.C. § 1983, challenges the constitutionality of Section 20-112 of the South Carolina Code of Laws, 1962, as amended, which provides in pertinent part: "In every action for divorce from the bonds of matrimony, the wife . . . may . . . pray for the allowance to her of . . . suit money . . . If such claim shall appear well founded the Court shall allow a reasonable sum therefor." Under South Carolina law, the right of a litigant to recover attorneys' fees exists solely when provided by statute, *Collins* v. *Collins,* 239 S.C. 170, 122 S.E.2d 1, 4 (1961), so that the above statute has the effect of authorizing attorneys' fees to wives but not to husbands.

The instant case originated when a state court awarded attorneys' fees to respondents on the sole authority of the above statute. Petitioner sought to challenge the constitutionality of this statute in the state court, but the state court refused to consider the claim. At that point, petitioner filed this case in district court. He alleged that the statute is unconstitutional, on its face and as applied to him, because it invidiously discriminates on the basis of sex, and because it denied

due process of law by failing to inquire whether his former wife had need of an award of attorney's fees. He sought a declaratory judgment and injunctive relief to prohibit the enforcement of the aforesaid statute against him by his former wife, the attorneys for his former wife, clerks of court, and a judge who had issued an order to enforce the statute against him.

Respondents moved to dismiss the action on the chief grounds that the same issue was presented in a pending state court proceeding between the same parties. The district court dismissed the complaint, holding, first, that this was simply a domestic case not properly in the federal court at all, and, second, that comity required it to leave the matter to the state courts. In a brief per curiam opinion, the court of appeals affirmed the district court's analysis that comity required dismissal of the action simply because the same issues had been argued to the state courts in a pending civil action. Although respondents had urged, in the state court, three separate procedural grounds why the state court should not rule on the merits of the constitutional claim presented, respondents were allowed to prevail in the courts below on the theory that the state court would in fact rule on the merits of the issue.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari and reverse the judgment below because that judgment is in square conflict with two recent decisions of this Court: (1) *American Trial Lawyers Association, N. J. Branch* v. *New Jersey Supreme Court*, 409 U.S. 467 (1973), and (2) *Steffel* v. *Thompson*, — U.S. —, 39 L.Ed.2d 505 (1974). Petitioner believes it is clear that on the merits his complaint raised substantial federal constitutional ques-

tions which called for serious adjudication by a three-judge district court. Petitioner believes it is equally clear that if the pendency of a state proceeding called for the district court to exercise discretion to abstain, that decision could be made only by a three-judge court and such court was required to retain jurisdiction to await the outcome of the state proceeding.

The district court saw this case as one in which federal jurisdiction was wholly lacking, *infra* p. 8a;

> This is not a federal court case. It is a domestic case and all the window dressing cannot change the true nature of the action.

This was fundamental error, for the constitutional challenges to this statute which have been raised by petitioner are substantial. This court has itself held unconstitutional statutes which make flat sex distinctions based solely on custom. *Reed* v. *Reed*, 404 U.S. 71 (1971); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). The statute in question here is of precisely the same sort, since it authorizes the award of attorneys' fees to wives in domestic cases, without regard to their need or other circumstances, but not husbands, no matter what the circumstances. A statute of this sort has been held unconstitutional by the only court which has reviewed it. *Wiegand* v. *Wiegand*, — Pa. Super. —, 42 L.W. 2183 (Sept. 19, 1973). Thus it is clear that, whatever the procedural issues touching the relationship between federal and state courts, this case on the merits is a traditional civil rights case coming squarely within the function of the federal courts, and the district court erred in holding that petitioner's challenge to its constitutionality failed to state a federal claim.

The court of appeals preferred to rest dismissal on the district court's alternate ground of comity. But if this is a case in which the federal court should have abstained on grounds of comity, there are certain clearly defined guidelines for such cases, which were flatly ignored in this case. Those guidelines make it clear that (1) if abstention were called for, the district court must retain jurisdiction so as to insure its ability to guarantee federal rights if the conclusion of the state proceedings left those federal rights unprotected or not considered, and (2) that the decision to abstain itself, like all other decisions requiring the exercise of discretion in a case raising serious federal questions which might lead a federal court to enjoin enforcement of a state statute, must be made only after a three-judge court has been convened.

(1) Abstention

In *American Trial Lawyers Assn.* v. *New Jersey Supreme Court, supra,* a district court dismissed a complaint that alleged that state court rules restricting attorneys' fees were unconstitutional. The three-judge district court abstained, and refused to retain jurisdiction or specify that the dismissal of the action was without prejudice. On appeal to this court, appellants attacked only the dismissal, and this court held that when a district court abstains in order to defer decision to a state court forum, "the proper course is for the District Court to retain jurisdiction pending the proceedings in the state courts." 409 U.S. at 469. The Court quoted the earlier decision in *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 416 (1964), to the effect that "abstention 'does not, of course, involve the abdication of federal jurisdiction,

but only the postponement of its exercise.' " *England* had made clear that in an action where a federal court initially abstains, the federal plaintiff is not limited to the "inadequate substitute" of review of a state court judgment by appeal in this Court: "The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts." *Id.* at 417.

These cases form parts of the careful pathway this Court has picked in recent years in defining the relationship between federal and state courts. *McNeese* v. *Board of Education*, 373 U.S. 668 (1963); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Zwickler* v. *Koota*, 389 U.S. 241 (1967); *Atlantic Coast Line R.Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970); *Younger* v. *Harris*, 401 U.S. 37 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Mitchum* v. *Foster*, 407 U.S. 225 (1972). *Roe* v. *Wade*, 410 U.S. 113, 166 (1973); *Doe* v. *Bolton*, 410 U.S. 179, 201 (1973); *Steffel* v. *Thompson*, *supra*. While this Court has always admonished federal courts to allow room and time for the state courts to decide questions properly brought before them, this Court has likewise made it clear at all times that the federal courts sit to provide ultimate protection for federal rights on those occasions when state courts will not. The underlying assumption of these cases is the belief that state courts will provide adequate remedies for federal rights, but the federal courts are ordered to remain available to test that underlying assumption and to provide relief upon a showing that it has proved unwarranted.

In this case, in addition to the general principles calling for retention of jurisdiction, several factors

make the need more pointed. First, there is a specific allegation in the complaint that the state courts will not provide an adequate forum, and that allegation is supported by the objective fact that the state trial court refused even to consider the constitutional argument.[1] Second, there is a pressing need to resolve the constitutional questions since there have been repeated conflicts in the past between these parties over the application of the statute in question. That need is magnified by the sheer enormity of the sum of $175,000.00 in attorneys' fees awarded against the petitioner, which has a chilling effect on his right to litigate or defend against litigation based on legitimate disputes with his former wife as to the proper construction of their marital settlement agreement.

This petition does not seek an order by a federal court interrupting a state court proceeding. Petitioner is satisfied to allow the state court proceeding to go to termination if a competent forum (a three-judge court) determines that it should. What petitioner does seek is the right to return to federal court, expeditiously and without complication, if petitioner's prediction of the inadequacy of the state remedy is

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[1] The court of appeals assumed, contrary to this allegation, that the state court would adjudicate the merits of the constitutional claim. Since the allegations of the complaint must be accepted as true on a motion to dismiss, this is a further reason that dismissal was erroneous. *Goosby* v. *Osser*, 409 U.S. 512, 521 N.7 (1973); *Ex parte Poresky*, 290 U.S. 30 (1933); *Mosher* v. *City of Phoenix*, 287 U.S. 29 (1930). Petitioner would note that the South Carolina Supreme Court heard oral argument almost exactly one year ago, and has not yet rendered an opinion; this period of delay is wholly unprecedented for the South Carolina Supreme Court, which renders virtually all its decisions no more than three months after argument.

proved.[2] Cf. *Perez* v. *Ledesma*, 401 U.S. 82, 103-4 (1971) (Brennan, J., concurring and dissenting).

(2) Three-Judge Court

In *Steffel* v. *Thompson*, 39 L.Ed.2d 505 (1974), this Court reiterated the well-settled principle that when a three-judge court is sought in an action requesting injunctive relief against the enforcement of a state statute, the three-judge court must be convened to make *any* decision on the merits of the case, unless the constitutional question presented is patently insubstantial:

> "Since the complaint had originally sought to enjoin enforcement of the state statute on grounds of unconstitutionality, a three-judge district court should have been convened. See 28 U.S.C. § 2281; *Goosby* v. *Osser*, 409 U.S. 512 (1973); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962). A three-judge court is required even if the constitutional attack—as here—is upon the statute as applied, see *Department of Employment* v. *United States*, 385 U.S. 355 (1966); *Query* v.

[2] The *American Trial Lawyers* case might be interpreted to allow a federal court to dismiss an action when abstaining if the dismissal is clearly without prejudice. In this case, the district court was plainly of the opinion that this action should not be heard in federal court, and the court of appeals affirmed the dismissal without modification. In cases such as this one, which present issues of pending state court proceedings and multiple state court proceedings, it is imperative that jurisdiction be retained. Otherwise, the courts may be confronted with unnecessarily complicated issues of res judicata, and the federal plaintiff may be faced with state court proceedings, instituted after the dismissal of the federal action, which are pending when he seeks to refile the federal action. "The portal of the federal court should not be a revolving door through which litigants may never gain entrance for the adjudication of claims of deprivation of federal rights." *Devine Street Bookmart, Inc.* v. *Bourne*, Civil No. 73-1124 (D.S.C. April 8, 1974), slip opinion at 8.

United States, 316 U.S. 486 (1942); *Ex parte Bransford,* 310 U.S. 354, 361 (1940); see generally Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 37-50 (1964); and is normally required even if the decision is to dismiss under *Younger-Samuels* principles, since an exercise of discretion will usually be necessary, see *Jones* v. *Wade,* 479 F.2d 1176, 1180 (1973); *Abele* v. *Markle,* 452 F.2d 1121, 1125 (1971); see generally Note, The Three-Judge District Court: Scope and Procedure Under Section 2281, 77 Harv. L. Rev. 299, 309 (1963)." *Id.* at 513 n.7.

The substantial nature of the constitutional question presented has never been questioned by respondents or the courts below.[3]

The courts below failed to apply this well-settled doctrine because they erroneously relied upon the doctrine of *Maryland Citizens for a Representative General Assembly* v. *Governor of Maryland,* 429 F.2d 606 (4th Cir. 1970). In that case, Judge Haynsworth wrote that a single district judge is empowered to evaluate whether a complaint that seeks the convening of a three-judge court presents a claim that is insubstantial "because injunctive relief is otherwise unavailable." Id.

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[3] The District Court suggested that the state court officials were joined only as nominal parties. However, the joinder of these officials as parties defendant was no more nominal than the joinder as defendants of magistrates and other court officials in the cases heard by three-judge courts on the constitutionality of replevin statutes, *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), or the joinder of the state court judge who issued a preliminary order in another case heard by a three-judge court, *Mitchum* v. *Foster,* 315 F.Supp. 1387 (N.D. Fla. 1970), *rev'd,* 407 U.S. 225 (1972). A state official who has issued an order against the plaintiff pursuant to the challenged statute is a necessary party, not a nominal party.

at 611. This Court has never held that a single district judge is authorized to examine the merits of the complaint to determine whether the complaint establishes sufficient basis for equitable relief, *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962); cf. *Goosby* v. *Osser, supra,* at 521. Therefore the very notion of a single judge inquiring into the availability of equitable relief is at odds with the settled doctrine of this Court's opinions.[4] Even if the principle might occasionally be invoked where the claim for equitable relief is patently frivolous, the application of any such principle to the facts of this case, alleging an inadequate state forum, repeated application of the statute, and a chilling effect on petitioner's access to the state courts, is clearly "an exercise of discretion" which this Court requires be done by a three-judge court, even in evaluating a decision to abstain under *Younger-Samuels* principles, *Steffel* v. *Thompson, supra.*

CONCLUSION

Petitioner suggests that this is a particularly appropriate case for granting certiorari. (1) The issues of the jurisdiction and procedures of three-judge courts are important. (2) The conflict with *American Trial Lawyers Association* v. *New Jersey Supreme Court,* and with *Steffel* v. *Thompson,* is clear. Petitioner would further suggest that the issues are so plain that this case should be summarily reversed, without the necessity of further argument on the merits.

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[4] In the *Maryland Citizens* case, the district judge had weighed the equities involved in hearing a legislative reapportionment suit filed several weeks before the regularly scheduled primary qualifying date and many months before the general election, and dismissed the complaint.

For the foregoing reasons, the writ of certiorari should be granted, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed, and this cause should be remanded with instructions that a three-judge court should be convened to consider the question of abstention, and should—if it abstains—retain jurisdiction pending the disposition of issues in the state proceeding.

Respectfully submitted,

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APPENDIX A

Opinion of the United States District Court for the District of South Carolina (Columbia Division)

(Robert W. Hemphill, J.)

Civil Action No. 73-103

COLGATE W. DARDEN, III, *Plaintiff*

v.

ELIZABETH J. WITHAM, ET AL., *Defendants*

Disguising his case as a civil rights case under the provisions of 42 U.S.C. §§ 1981, *et. seq.*, plaintiff, by complaint filed January 24, 1973, asked the following relief:

(1) The finding that the action is a proper action for consideration by a statutory three-judge court and the convening of such court to hear the action pursuant to 22 U.S.C. § 2281;

(2) The issuing of a preliminary and permanent injunction, staying, pursuant to 42 U.S.C. § 1983, all proceedings in the State Court action, *Darden* v. *Witham*, in the Court of Common Pleas for Aiken County, South Carolina, and in the Supreme Court of South Carolina, until the Federal Court could issue a final decision on the merits of this action;

(3) Issuing preliminary and permanent injunctions against the enforcement of the Code of Laws of South Carolina, 1962, as amended, Section 20-112;

(4) Declaring, pursuant to 28 U.S.C. §§ 2201, 2202, and 2284 that the Code of Laws of the State of South Carolina, 1962, as amended, Section 20-112, is invalid on its face and as applied under the Equal Protection and Due Process Clauses of the United States Constitution, Amendment XIV;

(5) Awarding plaintiff his costs of the action; and

(6) Granting such other and further relief as the court seems [sic] equitable, et cetera.

The real effort in this case is plaintiff's hope of having this court relieve him from an award, in the State Court, to his wife's attorneys, of attorneys' fees in the amount of One Hundred Seventy-Five Thousand ($175,000.00) Dollars. In order to get the jurisdiction of this court, and have a duplication of action resulting in "two bites at the cherry," plaintiff pleads the constitutionality of Section 20-112. This court will take judicial notice of the fact that in the State action, entitled Colgate W. Darden, III, Appellate, against Elizabeth J. Witham, formerly Elizabeth J. Darden, and the Virginia National Bank of Norfolk, Virginia, Respondents, now pending (having been heard in oral argument at the May Term, 1973, of the South Carolina Supreme Court), contains in the record Exception No. 5 which reads as follows:

> That his Honor (Judge Ness) erred in refusing to receive evidence as to the constitutionality of Section 20-112, South Carolina Code of Laws of 1962, the error being that said Section is unconstitutional in that it discriminates against the husband in favor of the wife[1]

This court feels that the case is improperly in this court for the reasons hereinafter stated.

BACKGROUND

In an uncontested divorce action reduced to final judgment, defendant Elizabeth J. Witham was granted a divorce in 1967, divorcing her from her husband—plaintiff Darden—on the grounds of desertion; the decree of the court incorporated an agreement between the parties pro-

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[1] An asterisk at the end of this Exception in the transcript of record, a copy of which has been furnished to this member of the court by the Clerk of the Supreme Court of South Carolina, notes as a footnote as follows: (Appellant reserves such rights as it may have to present constitutional issues arising under the Constitution of the United States of America to the United States Courts for determination.")

viding for alimony to the divorced wife. In that agreement, plantiff agreed to pay defendant Witham alimony in the amount of Ninety Thousand ($90,000.00) Dollars per year for the first ten (10) years subsequent to the divorce, Eighty Thousand ($80,000.00) Dollars per year for the next ten (10) years, the payments to cease after twenty (20) years or when the wife died, whichever occurred first. Later there was controversy between the parties, ultimately resolved by mutual agreements, as to (1) the children accompanying the mother on a trip abroad (resolved March 1969) and (2) the choice of a proper school for the children (resolved June 1971). The alimony agreement provided that the payments would continue whether or not Mrs. Witham remarried. The complaint in the present action, was filed in the United States District Court for the District of South Carolina on January 24, 1973;[2] plaintiff alleges that the defendant law firms received a fee of One Hundred Five Thousand ($105,000.00) Dollars for their services rendered to defendant Witham in the first phase, the divorce action. It does not appear that any part of this fee was paid by the plaintiff.

Subsequent to the divorce, Mrs. Witham remarried, and plaintiff elected to bring an action in the State Court seeking to have his divorce obligations, as to alimony payments, terminated because of her remarriage. This case was heard in the State trial court, lost by plaintiff and by him appealed to the South Carolina Supreme Court, *Darden* v. *Witham*, — S.C. —, 188 S.E.2d 776. The Supreme Court of South Carolina affirmed the lower court's denial of relief to the plaintiff. In the State Court proceeding both the lower court and the Supreme Court ruled that plaintiff's obligation to make the alimony payments to defendant was

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[2] In the State Court, the notice of motion that attorneys for Mrs. Witham would move before the Resident Judge of the Second Judicial Circuit of South Carolina for the setting of a reasonable attorney's fee dated June 26, 1972.

not terminated by a remarriage and that the plaintiff's action was "essentially an outgrowth of, and supplementary to the original 1967 divorce action," and, "that an award of an attorney's fee is quite proper." The plaintiff did not appeal this decision to the United States Supreme Court.

A transcript of record on appeal to the South Carolina Supreme Court in this latest case, involving attorneys' fees, shows that the parties participated in extensive discovery in an adversary proceeding held for the purpose of setting the amount of such fee. The resident judge of the Second South Carolina Judicial Circuit, after a full hearing, found that One Hundred Seventy-Five Thousand ($175,000.00) Dollars was a reasonable amount for such attorney's fee, and that decision is the decision now under appellate review in the South Carolina Supreme Court. On the second appeal, plaintiff raised and argued extensively the position that the statute under which the award was made, South Carolina Code Section 20-112 is unconstitutional on grounds that the statute denied him equal protection by unwarranted sexual discrimination.

Plaintiff has processed in the State courts all of the issues arising out of the 1968 divorce decree, and all the issues raised in this Federal court action have been raised in the State court action. The State court action was commenced almost two years ago, and it has been processed in two trials and one appeal, and another appeal has been heard by the State Supreme Court. Plaintiff now seeks to have the Federal court review every possible Federal issue he has taken up in the State court in his second appeal.

Presently, this court is called upon to pass upon a motion by defendants Witham; Blatt, Fales, Peeples, Bedingfield and Loadholt (one law firm) and Henderson, Salley, Bodenheimer and Lynn (another law firm) to dismiss the action because the complaint fails to state a claim against

the defendants upon which relief can be granted. This motion was filed February 8, 1973, and heard February 12, 1973. Counsel asked for time to forward additional briefs to the court, and this was granted.

THREE-JUDGE COURT

Except for his effort to have this case categorized as a civil rights suit under the provisions of 42 U.S.C. § 1981, *et seq.* plaintiff raises no issues in this court which are not presently before the South Carolina Supreme Court in the pending case of *Darden* v. *Witham* (No. 7980) so that it is obvious that the case which the plaintiff now wishes the Federal Court to hear not only has been heard by the State Court, but is essentially a domestic relations case. It has long been the policy of the United States that the Federal Courts will not act in domestic relations cases and probate matters, an understandable reason being "these are areas of law in which the States have an especially strong interest and a well developed competence for dealing with them." Wright, *Law of Federal Courts*, page 84 (2d edition 1970).

It is true that, in an effort to come within the periphery of 28 U.S.C. § 2281, plaintiff has named the State Circuit Judge, the Clerk of the State Supreme Court, and the Clerk of Court of Common Pleas for Aiken County as defendants, seeking to restrain them from enforcing the challenged statute. In his brief, however, at page 19, the plaintiff asserts, (and admits) that "the interested parties in the dispute herein are solely private litigants and that no interest of the sovereign state is jeopardized by Federal intervention here." It therefore appears obvious that the State Officers have been named perfunctory [sic] or as nominal defendants purely in an attempt to satisfy the requirements of the jurisdictional section. A three-judge Federal Court should not be convened to decide this domestic relations case between private litigants, on a foundation such as exists here:

> There is settled law that a State Officer cannot be named perfunctorily or as a nominal defendant in an attempt to obtain the wanted official action. Bond v. Dentzer, 325 F.Supp. 1343, 1348 (N.D. N.Y. 1971), citing Moody v. Flowers, 387 U.S. 97; Wilentz v. Sovereign Camp, 306 U.S. 573; Oklahoma Gas & Electric Co., v. Oklahoma Packing Co., 292 U.S. 386.

As stated by Chief Judge Haynsworth in *Maryland Citizens for a Representative General Assembly* v. *The Governor of Maryland*, 429 F.2d 606, 611:

> If it appears to the single district judge, therefore, that the complaint does not state a substantial claim for injunctive relief, he need not request the convening of a three-judge court. Insubstantiality in the claim may appear because of absence of federal jurisdiction, lack of substantive merit in the constitutional claim, or because injunctive relief is otherwise unavailable. Such insubstantiality may be evident from the frivolous nature of the claim or from previous decisions of the Supreme Court which require an adverse answer. When it thus appears that there is no substantial question for a three-judge court to answer, dismissal of the claim for injunctive relief by the single district judge is consistent with the purpose of the three-judge statutes, and it avoids the waste and delay inherent in a cumbersome procedure.[3]

Before this court is a case in which a State action is proceeding, and in that State action the constitutionality of the South Carolina Code sections challenged in this court is there challenged. The Supreme Court of South Carolina has the challenge under advisement. In the event of an ad-

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[3] See also Star v. Parks, 345 F.Supp. 795 (D. Md. 1972); Barthelmes v. Morris, 342 F.Supp. 153 (D. Md. 1972); Shapiro v. State of Maryland, 336 F.Supp. 1205 (D. Md. 1972).

verse decision, either party can petition for certiorari to the United States Supreme Court. These facts make frivolous the efforts of the plaintiff and they also bring this case within the ambit of *Younger* v. *Harris,* 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971). The effect of this court's entertainment of this suit and the granting of any injunction at this time would be in direct violation of what the Supreme Court prohibited in *Younger,* supra, declaring the granting of an injunction was "a violation of national policy forbidding federal courts to stay or enjoin pending State Court proceedings except under special circumstances." (401 U.S. 41). The Supreme Court reviewed the long standing public policy against Federal court intervention with State court proceedings. One of the basic reasonings for this policy is "the doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."

In order to avoid the presumption against Federal court interference with pending State action as enunciated in *Younger,* the plaintiff must show that, unless the Federal court interferes with the State action, he is in great and immediate danger of suffering irreparable injury. In the case before this court, as was said in *Veen* v. *Davis*:[4]

> Although the Complaint does allege "great, immediate and irreparable injury and loss to plaintiffs," this is merely conclusory for, under the facts as alleged and the offer of proof at the hearing on the Temporary Restraining Order, it is clear that plaintiffs have not carried their burden of showing they have suffered any injury other than each being required to defend single state court prosecutions.

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[4] 326 F.Supp. 116 (C.D. California 1971); see also Pederson v. Breier, 327 F.Supp. 1382 (D.C. Wisconsin 1971).

Here plaintiff asserts abridgement of no First Amendment right, such as freedom of speech, press or assembly. He claims that because of "the possibility that he may be ordered to pay the further large fees to Mrs. Witham's attorneys"[5] in the possible future disputes that the "statute is chilling plaintiff's resort to the courts"[6], and that if the Federal court refused to intervene "the plaintiff *may* [emphasis added] be forced to litigate the issue once again in the context of the future proceeding that he might prefer to avoid."[7]

This is not a Federal court case. It is a domestic case and all the window dressing cannot change the true nature of the action.

Additionally, on the grounds of comity, plaintiff's suit should be dismissed. The Supreme Court of South Carolina held in *Darden* v. *Witham, supra,* that the action to invalidate the alimony section of the divorce decree was essentially a part of the original 1967 divorce action; and, as such, an award of an attorney's fee was quite proper. As was said in *Collins* v. *Collins*, 239 S.C. 170, 122 S.E.2d 1 (1961), the statutory allowance of an attorney's fee is authorized for services in the particular divorce action before the court.[8] Only when subsequent litigation attacks the

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[5] Page 5 of the plaintiff's brief.

[6] Page 22 of plaintiff's brief.

[7] *Ibid.*

[8] Section 20-112 of the 1962 Code which is the statutory authority for respondent's claim, provides that in every action for absolute divorce the wife, whether plaintiff or defendant, may apply for allowance of a fee for her attorney, and that if such claim appears well founded the court shall allow a reasonable sum therefor. The statute does not suggest that the fee be in anywise referable to services in other litigation, and we construe it as authorizing its allowance for service in the particular action only.

validity of a hardened decree of divorce does it become so vitally dependent as to become an actual part of the original divorce proceeding and within the attorney's fee authorization. Such restricted construction by the South Carolina Supreme Court eliminates the possibility of "harassment" or "chilling effect" which the plaintiff claims.

Younger and its companion cases dealt with comity as it applied in a criminal context. The Fourth Circuit in a recent case of *Lynch* v. *Snepp*, No. 72-2377 (4 Cir., January 26, 1973), decided the question: "to what extent the general notions of comity, equity and federalism, as exposited in *Younger* and its companion cases, apply in this civil context?" The court found that the reasons for applying these general notions of comity, equity and federalism are at least equally as great in the civil case as in a criminal context.

Snepp, in a brilliant treatment of the comity between the two sovereignties, quoted *Wilson* v. *Schnettler*, 365 U.S. 381, 385, 81 S.Ct. 632, 635, 5 L.Ed.2d 620 (1961), in that:

> We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them.

The court went on to say that one such rule earlier adopted by the court is that:

> Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases.

Taylor v. *Tainter*, 16 Wall. 366, 370, 21 L.Ed. 287 (1873). Thus ordinarily the jurisdiction of a state court first obtained should not be interfered with by federal courts. *Ex parte Chetwood*, 165 U.S. 443, 17 S.Ct. 385, 41 L.Ed. 782 (1897).

Snepp was appealed by North Carolina officials from the granting of a preliminary injunction by a United States District Judge. The federal injunction had the effect of restraining the enforcement of a state injunction intended to control access to the public schools of Mecklenburg County, North Carolina. In reversing the lower court, the Court of Appeals spoke extensively of the "long standing public policy against federal court interference with state court proceeding." [Sic]

In the case before us, for this court to take jurisdiction and to entertain issues which are presently before the South Carolina Supreme Court, not concluded, and which should properly be pursued there or taken to the United States Supreme Court, would indicate a lack of comity in which this court will not engage.

For the reasons stated the motion to dismiss is granted.

And It Is So Ordered.

APPENDIX B

Opinion of the United States Court of Appeals for the Fourth Circuit

No. 73-1962

COLGATE W. DARDEN, III *Appellant*

v.

ELIZABETH J. WITHAM, ET AL., *Appellees*

PER CURIAM:

The plaintiff and the defendant Witham have been engaged in litigation in the State Courts for a number of years. Such litigation involves their prior marriage and a support and maintenance agreement made in connection with their divorce. As a result of an order entered by the State Court in this litigation, the defendant Witham was awarded substantial attorneys' fees against the plaintiff. The order granting such award is pending on appeal before the Supreme Court of South Carolina. In fact, the appeal has been heard orally and only awaits the filing of an opinion. At this stage in the State proceedings, the plaintiff filed this federal action, seeking to enjoin further proceedings in the State Courts in the litigation between him and his former wife; the plaintiff also sought a declaratory judgment of the invalidity on federal constitutional grounds of Section 20-112, Code of Laws of South Carolina (1962), on which it is alleged the award of attorneys' fees was made, and for an injunction against its enforcement. He denominated his action a class action and requested the convening of a three-judge court under the terms of Section 2281, 28 U.S.C. The District Court, in a thoughtful and well-reasoned opinion, found that comity compelled the dismissal of the action and the denial of the request for the convening of a three-judge court. We agree. The plaintiff is before the Supreme Court of South Carolina; the issue of the constitutional validity of Section 20-112 is before that Court and it may be assumed will be resolved by that Court. Respect for that Court commands that we defer to that Court in ruling on the constitutionality of the statute in question.

AFFIRMED.

APPENDIX C

Opinion of the Court of Common Pleas for Aiken County, South Carolina

(J. B. Ness, J.)

(July 15, 1971) (Order Portion Only)

COLGATE W. DARDEN, III

v.

ELIZABETH J. WITHAM

Ordered that the Petition herein be, and the same hereby is, dismissed.

Further ordered that the respondent, Elizabeth J. Witham, be, and she hereby is, granted permission to apply to this Court, if she be so advised, for a reasonable attorneys' fee to be paid to her attorneys for defending this action.

Further ordered that the petitioner, Colgate W. Darden, III, be, and he hereby is, directed to pay immediately upon the filing of this Order the sum of Twenty-two Thousand Five Hundred Dollars ($22,500.00) owed to the respondent, Elizabeth J. Witham, as of May 1, 1971.

Further ordered that the petioner, Colgate W. Darden, III, be, and he hereby is, directed to timely comply with all of the terms of the Decree of Divorce and the Property Settlement Agreement between said petitioner and the respondent, Elizabeth J. Witham, dated October 27, 1967, with particular reference to the terms of the said Decree and Property Settlement Agreement providing for quarterly payments to the respondent, Elizabeth J. Witham.

APPENDIX D

Opinion of the Court of Common Pleas for Aiken County, South Carolina (J. B. Ness, J.) (November 11, 1972) (First Five Paragraphs only)

COLGATE W. DARDEN, III

v.

ELIZABETH J. WITHAM

This is a motion to set a reasonable attorneys' fee in the above entitled matter, pursuant to Order of this Court dated July 15, 1971, affirmed by the Supreme Court of South Carolina, ...S.C. ...., 188 S.E.2d 776, and remanded by the Supreme Court to this Court for the sole purpose of establishing such fee. This action was originally instituted by the Petitioner to set aside a property settlement agreement made a part of an action for divorce between Petitioner and Respondent, Witham, and which original action resulted in the aforesaid Order of this Court dated July 15, 1971, denying the relief sought by Petitioner and directing that Petitioner pay a reasonable attorneys' fee for services rendered by Respondent's attorneys therein. In that connection the Order of this Court under consideration stated:

> "The respondent Witham seeks a reasonable attorneys' fee for the attorneys defending this action for her, and it is my opinion that Sections 20-112, 20-113 and 20-116 authorize this Court, in the exercise of its discretion, to award such fees. In addition, it would seem to this Court that Section 20-116 which authorizes the Court to make such modifications in the payment of alimony as changed circumstances may warrant, carries with it the inherent authority to award attorneys' fees to the wife where the Court feels that the circumstances and equities of the situation demand it. The Annotation in 15 A.L.R.2d 1270, and the cases of *Walters* v. *Walters* (Ill.), 99 N.E.2d 342, *Barnette* v. *Barnette* (Ariz.), 388 P.2d 433, and *Jacobson* v. *Jacobson* (Ill.), 200 N.E.2d 379, are supportive authorities

for this position. Since there is no evidence before this Court upon which I can at this time determine a reasonable attorneys' fee to be paid to the respondent Witham's attorneys, said respondent is hereby granted leave to hereafter make petition to this Court, as she may be advised, for a hearing at which time a reasonable fee for her attorneys can be determined."

Appealing the decision of this Court to the Supreme Court of South Carolina, the attorneys for the Petitioner included in their exceptions to the July 15, 1971, Order of this Court Exceptions 12 and 13, as follows:

Exception (12): "That His Honor erred in granting attorneys' fees to Respondent's attorneys, the error being that the granting of attorneys' fees is not authorized under the Uniform Declaratory Judgment Act, Section 10-2001, Code of 1962, under which this action was brought."

Exception (13): "That His Honor erred in granting attorneys' fees to Respondent's attorneys, the error being that it is clear from the record that she is of such wealth as to be fully able to compensate her own attorneys."

The Supreme Court of South Carolina in affirming the Order of this Court in its entirety (*Darden* vs. *Witham*, et al., ... of .... S.C. ...., 188 S.E.2d 776), at page ... of ... S.C. ... stated:

"Darden excepts to that portion of Judge Ness' order which granted Witham leave to apply to the court for attorneys' fees. He contends that this action was originally brought pursuant to the Declaratory Judgment Act (Code § 10-200 et seq.) He further contends that that Act permits an award of costs (§ 10-2010) but not an award of attorneys' fees.

"Judge Ness issued a supplemental order on July 23, 1971, wherein he states that 'it was agreed for both

parties that this Court would consider the entire matter as a Declaratory Judgment action and would pass upon all issues raised.

"While the matter may have been treated as a declaratory judgment action by consent, the fact remains that this suit is essentially an outgrowth of, and supplementary to, the original 1967 divorce action. Normally the issues before us would have been determined within the divorce proceeding. The fact that the same issues were presented by way of a declaratory judgment proceeding should not alter the obligation of Darden to pay attorneys' fees if, under Code Section 20-112, the court deemed this appropriate. Under these circumstances we feel that an award of an attorney's fee is quite proper and the case is remanded to the lower court for disposition of that matter."

At the commencement of the Hearing held responsive to the Motion of Respondent's counsel asking this Court to set a reasonable attorneys' fee for them, counsel for Petitioner raised the question that the issue before the Court was not solely the amount of the fee but urged that the Court must first determine whether Respondent's counsel were entitled to a fee and, if so, then determine the amount of such fee. It is clear to me that my earlier Order of July 15, 1971, affirmed by the South Carolina Supreme Court, expressly provided that the Petitioner should pay Respondent's attorneys a reasonable fee and left only for later decision the actual amount of that fee. I did then, and do now, deem it appropriate, under Section 20-112 of the 1962 Code of Laws, as amended, that Petitioner be required to pay a reasonable fee to the attorneys for the Respondent, Witham, for their services in this matter. Certainly this was the intent of that Order, and proof that Petitioner's attorneys understood clearly the intent of that Order, and acted thereon, is best revealed by their two exceptions to the Order as heretofore set forth.

Referring to these two exceptions, the Supreme Court, in affirming the Order, stated that this Court had authority under Section 20-112 of the 1962 Code of Laws, as amended, to award attorneys' fees to Respondent's attorneys if this Court deemed such award appropriate, and there is no doubt in my mind that all parties understood from the earlier Order that this Court had found and determined such an award to be appropriate. The Supreme Court further stated that it felt such award was quite proper and it demanded the case to this Court for the setting of a reasonable fee. Based on these factors I hold as a matter of law at the commencement of the Hearing on this question that the only issue remaining before me in this case was the determination of a reasonable amount to be paid by the Petitioner to the Respondent's attorneys. Even if it could now be said that there was some doubt as to the actual meaning of my Order of July 15, 1971, by Exception 12 and Exception 13 of his appeal to the Supreme Court, Petitioner questioned the authority of this Court to grant the fee now sought and the correctness of this Court in awarding such a fee, and the decision of the Supreme Court expressly upholding this Court in reference to these two particular exceptions has now become the law of this case. *Jenkins* v. *Southern Railway Company,* 145 S.C. 161, 143 S.E. 113.

SUPREME COURT, U. S.

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MAY 30 1974

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1643

COLGATE W. DARDEN, III, PETITIONER,

versus

ELIZABETH J. WITHAM; BLATT, FALES, PEEPLES, BEDINGFIELD & LOADHOLT; HENDERSON, SALLEY, BODENHEIMER & LYNN; CLEO J. SCOTT, CLERK OF THE COURT OF COMMON PLEAS FOR AIKEN COUNTY, S. C.; HONORABLE J. B. NESS, PRESIDING JUDGE, SECOND JUDICIAL CIRCUIT; FRANCES SMITH, CLERK OF THE SUPREME COURT OF SOUTH CAROLINA, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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comity and federalism. *Younger v. Harris,* 401 U. S. 37 (1971); *Samuels v. Mackell,* 401 U. S. 66 (1971).

The case of *Steffel v. Thompson,* 39 L. Ed. (2d) 505 (1974), upon which the Petitioner also relies as being in conflict with the decision below is also clearly distinguishable in that it was a case in which the state court action was not pending, as here and in *Younger* and *Samuels,* but was only threatened.

In the instant case not only was the state court action pending at the time of filing the federal action, it had been pending for almost two years when the Petitioner became dissatisfied with the forum which he himself initially chose and sought by the federal action to shift his constitutional claims from the state's highest court to the federal court which he apparently felt would be more sympathetic to his position.

Under facts such as these the Petitioner was so clearly not entitled to equitable relief that for the District Court to have done anything other than grant the Motion to Dismiss would have been inequitable and an unjustified burden on the federal judiciary when the Petitioner obviously had an adequate remedy at law, that is, his right to a decision by the South Carolina Supreme Court before whom he had already raised the exact same constitutional questions as presented to the federal court, together with his right to seek review in this Court of the decision rendered by the state court. Any other decision by the District Court and the Fourth Circuit would have resulted in "duplicative legal proceedings" and would have reflected "negatively upon the state courts' ability to enforce constitutional principles." *Steffel v. Thompson,* 39 L. Ed. (2d) 505, 516 (1974).

If it should be decided that jurisdiction should have been retained, it should be by the single judge and a three-

judge court should not be called because the Petitioner has in his petition apparently abandoned his request for injunctive relief and only his request for declaratory relief remains. He says that his "petition does not seek an order by a federal court interrupting a state court proceeding." (Pet., p. 9.)

CONCLUSION

This is a particularly inappropriate case for granting *certiorari.* There is no substantial constitutional or federal question presented. The exact same constitutional question has been raised and argued before the Supreme Court of South Carolina from which court a decision is expected shortly. The decision of that court may settle the issue to the satisfaction of the Petitioner. If, however, the Petitioner is not satisfied with the decision of that court, he can seek review of that decision by this Court.

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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OCTOBER TERM, 1973

No. 73-1643

COLGATE W. DARDEN, III, PETITIONER,

versus

ELIZABETH J. WITHAM; BLATT, FALES, PEEPLES, BEDINGFIELD & LOADHOLT; HENDERSON, SALLEY, BODENHEIMER & LYNN; CLEO J. SCOTT, CLERK OF THE COURT OF COMMON PLEAS FOR AIKEN COUNTY, S. C.; HONORABLE J. B. NESS, PRESIDING JUDGE, SECOND JUDICIAL CIRCUIT; FRANCES SMITH, CLERK OF THE SUPREME COURT OF SOUTH CAROLINA, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ADDENDUM OF LATE AUTHORITIES TO RESPONDENTS' BRIEF IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1643

COLGATE W. DARDEN, III, PETITIONER,

versus

ELIZABETH J. WITHAM; BLATT, FALES, PEEPLES, BEDINGFIELD & LOADHOLT; HENDERSON, SALLEY, BODENHEIMER & LYNN; CLEO J. SCOTT, CLERK OF THE COURT OF COMMON PLEAS FOR AIKEN COUNTY, S. C.; HONORABLE J. B. NESS, PRESIDING JUDGE, SECOND JUDICIAL CIRCUIT; FRANCES SMITH, CLERK OF THE SUPREME COURT OF SOUTH CAROLINA, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ADDENDUM OF LATE AUTHORITIES TO RESPONDENTS' BRIEF IN OPPOSITION

On October 11, 1974, the Supreme Court of South Carolina filed its opinion in the case of *Darden v. Witham,* Opinion No. 19898, between the same principal parties as in this action, affirming the decision of the lower state court and rejecting the same constitutional attack on South Carolina Code Section 20-112 which the Petitioner seeks to raise in this action.

In that opinion, which is set out in full in Appendix I hereto, the South Carolina Supreme Court said:

> The husband also attacks the constitutionality of Code Section 20-112, and argues that it violates the Fourteenth Amendment of the Constitution of the United States in that it provides for the payment of "suit money" only to one class of litigants (wives), a classification by sex that is not rationally related to any constitutionally permissible governmental purpose.
>
> The issue concerning the constitutionality of Section 20-112 was not presented in the lower court but was raised for the first time on appeal. The rule is well settled that a constitutional question not raised or passed upon in the lower court will be considered waived. The record reveals no reason to disregard this long established rule.

The federal action which the Petitioner seeks to bring is barred by the doctrine of *res judicata* which was applied in almost identical circumstances in the case of *Mertes v. Mertes*, 350 F. Supp. 472 (D. Del. 1972), *aff'd* 411 U. S. 961 (1973), wherein the Court in dismissing the action on the basis of *res judicata* said at page 474:

> The fact that the constitutional claim raised here was not considered by the Delaware Supreme Court because of Thomas' procedural default in failing to raise the issue in the lower state court does not make the doctrine inapplicable. Hilliard v. Commonwealth of Pennsylvania, 308 F. Supp. 756 (W. D. Pa. 1970), aff'd 438 F. (2d) 92 (C. A. 3, 1971). For the purpose of *res judicata*, when the Delaware Supreme Court affirmed the lower court decision, the constitutional issue is treated as though decided adversely to the plaintiff by that court despite its disclaimer of any intention to pass on the merits of the claim. Angel v. Bullington, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947).

Not only has the state's highest court entered its final decision, the state court judgment has been paid in full by the Petitioner herein. A copy of the Satisfaction of Judgment which was filed on November 19, 1974, is contained in Appendix II hereto. In addition to the Petitioners' federal action being barred by the doctrine of *res judicata*, the question which he seeks to present in this action has been rendered moot by his payment in full of the state court judgment under the statute which he seeks to attack in this action.

Respectfully submitted,

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Loadholt; and Henderson,
Salley, Bodenheimer &
Lynn.

APPENDIX 1

Opinion of the Supreme Court of South Carolina

No. 19898

COLGATE W. DARDEN, III, APPELLANT,

versus

ELIZABETH J. WITHAM, ET AL, RESPONDENTS

LEWIS, A. J.: The matter now before this Court is an outgrowth of our decision in *Darden v. Witham,* 258 S. C. 380, 188 S. E. (2d) 776. The action was originally brought by the appellant-Darden (herein called the husband), against the respondent-Witham (herein called the wife) as a declaratory judgment action to have the court declare the rights of the parties under a 1967 divorce decree, and a property settlement agreement adopted by the court as a part of the divorce decree. The property settlement agreement and the divorce decree provided that the husband make payments to the wife of $90,000 per year for ten years, to be followed by payments of $80,000 per year for an additional ten years, and also specifically provided that payments should continue during the stated periods regardless of the wife's remarriage.

In 1968, the wife remarried. In this action, the husband sought to have that portion of the agreement and decree concerning payments to the wife construed in the light of her remarriage and our divorce statutes, particularly Code Section 20-114. That statute provides ". . . in the event of the remarriage of the wife, the amount fixed in such decree for her support shall forthwith cease and no further such payments shall be required from such divorced husband." The lower court held that the husband's obligation to make payments continued notwithstanding the remarriage of the wife. We affirmed. Reference is made to *Darden v. Witham, supra,* for a more full understanding of the issues before us.

In our former opinion, we remanded the case to the lower court for the purpose of disposing of the wife's request to the court for fees to pay her attorneys. In discussing the husband's challenge that the lower court improperly granted leave to the wife to apply to that court for fees, we said:

> "Darden excepts to that portion of Judge Ness' order which granted Witham leave to apply to the court for attorneys' fees."
>
> . . . .
>
> ". . . The fact that the same issues were presented by way of a declaratory judgment proceeding should not alter the obligation of Darden to pay attorneys' fees if, under Code Section 20-112, the court deemed this appropriate. Under these circumstances we feel that an award of an attorneys' fee is quite proper and the case is remanded to the lower court for disposition of that matter."

Thereafter, the wife's attorneys requested the lower court to set reasonable attorneys' fees for their services. After an evidentiary hearing, the court ordered payment of $175,000 directly to the wife's attorneys. It is from this order that the husband appeals.

In his appeal, the husband raises four questions: (1) He charges error in the lower court's allowing any attorneys' fees under South Carolina Code Section 20-112 (1962) in the absence of a showing of need by the wife; (2) he challenges the constitutionality of Code Section 20-112; (3) he attacks the award given by the lower court as being excessive; and (4) he argues that it was improper for the lower court to make the award directly to the wife's attorneys instead of to her.

In considering the challenge of the award of suit money under Code Section 20-112, it becomes necessary to construe this court's decision in our prior Darden opinion.

At the evidentiary hearing, the judge construed our previous Darden opinion as holding that attorneys' fees should be paid. He refused to allow evidence on the question of the right to attorneys' fees and limited the hearing

to the amount only. The husband contended at the hearing, and now contends before this Court, that our opinion only held that the application for attorneys' fees could be made. He argues that there has been no finding that the allowance of "suit money" was "well founded" as required by Code Section 20-112, which reads as follows:

> "Section 20-112. Alimony; suit money.—In every action for divorce from the bonds of matrimony, the wife, whether she be plaintiff or defendant, may in her complaint or answer or by petition pray for the allowance to her of alimony and suit money and for the allowance to her of alimony and suit money pendente lite. If such claim shall appear well founded the court shall allow a reasonable sum therefor."

Normally, the burden of proving that a claim for suit money is "well founded" is upon the wife, and normally, the husband is entitled to have the factual issue determined in the lower court, but under the facts of this case, the question of whether the wife's claim that her right to suit money is "well founded" can no longer be in serious debate. At the evidentiary hearing on the attorneys' fees question, the husband admitted that he brought the action for the purpose of assuring to himself a tax advantage. He stated in response to his own counsel's question:

> "Q. Now, when this case—when this appeal was begun, can you tell us why you decided to take this matter up under appeal?
>
> "A. Well, it seems under the circumstances that I had no other alternative. Mr. Salley testified earlier today, the tax service that I subscribed to uncovered the situation with the Internal Revenue Service of the U. S., was challenging the deductibility of payments made in agreements such as the one I had signed, so that I would be confronted with on the one hand to be required by the Court to pay Ninety Thousand Dollars a year, and the Revenue Service on the other hand saying well the Court never had the authority to make you pay those, therefore, we disallow the deduction

and charge you with a gift tax, and, of course, I don't have that much income."

In his brief, he states:

"This action was commenced by the Appellant upon the advise of his tax counsel who informed him that as a result of *Allan Hoffman,* 54 T. C. 1607, that the deduction of the alimony payments might be in jeopardy."

Although the husband states that he sought no affirmative relief against the wife, it is inescapable that he asked the court to hold that the payments could be discontinued. If the court agreed with his contention, the payments would be discontinued; and if the court disagreed with his contention, he preserved a tax advantage he sought to keep. In his brief, the husband concedes:

". . . He is not now trying to avoid that Order; he is trying to insure that the award of attorneys' fees, if any, is reasonable and warranted under the circumstances."

In the light of the fact that the wife was thrown into litigation, jeopardizing her payments for the primary purpose of settling the husband's possible tax problems, we have no hesitancy in holding that the allowance of "suit money" is "well founded", and this is true whether she be financially able to pay her own attorney or not. The solemn agreement and the decree were designed to settle any monetary disputes between these parties. Certainly, it was never contemplated that the wife would have to litigate the agreement in order to preserve her rights.

The husband also attacks the constitutionality of Code Section 20-112, and argues that it violates the Fourteenth Amendment of the Constitution of the United States in that it provides for the payment of "suit money" only to one class of litigants (wives), a classification by sex that is not rationally related to any constitutionally permissible governmental purpose.

The issue concerning the constitutionality of Section 20-112 was not presented in the lower court but was raised for the first time on appeal. The rule is well settled that a

constitutional question not raised or passed upon in the lower court will be considered waived. The record reveals no reason to disregard this long established rule.

The next question presents the main issue in the appeal and involves the husband's contention that the award for attorneys' fees was excessive under the facts and circumstances of this case.

The testimony varied as to what a reasonable fee would be. Appellant's witnesses were of the opinion that a $75,000.00 fee would be reasonable; while respondent's witnesses varied in their opinions from $250,000.00 to $350,000.00. The trial judge, in the exercise of his discretion, set the fee at $175,000.00.

In determining the amount of the fee, the trial judge found "that the legal questions here involved were novel, complex and difficult" requiring an exhaustive review and research of the decisions from many other states. Respondent's attorneys spent in excess of 750 hours in handling this matter. The amount involved in the controversy was in excess of $1,500,000.00, payable over a period of twenty years. If respondent won, she would receive that amount. If she lost, she would receive nothing. The attorneys involved in this litigation were, admittedly, successful lawyers, with excellent reputations and a high degree of professional skill.

With reference to the expert testimony presented by the parties, the trial judge stated:

> ". . . , five eminently successful and outstanding attorneys testified as experts in this case and gave their professional opinion of a reasonable fee which should be paid to the Respondent's attorneys. Thomas H. Pope, Esquire, of the Newberry County Bar, G. Ross Anderson, Esquire, of the Anderson County Bar, and Terrell L. Glenn, Esquire, of the Richland County Bar, testified for the Respondent; and Augustus T. Graydon, Esquire, and John W. Thomas, Esquire, both of the Richland County Bar, testified for the Petitioner. All of these attorneys are experienced in the handling of novel legal questions involving large sums and each of them had, prior to their testimony, reviewed the

Transcript of Record and Briefs of counsel in the earlier case, the Affidavits of counsel attached to the Motion in the instant matter, and, to some extent, the Depositions filed of record in this case. Furthermore, each of these experienced attorneys stated that they had reviewed at length with counsel for the party on whose behalf they testified such counsel's file, and each of these witnesses stated that they had reviewed Canon 12 of the factors listed therein for establishing a reasonable fee. Mr. Pope testified that in his opinion a reasonable fee in this case would be between Two Hundred Fifty Thousand Dollars ($250,000.00) and Three Hundred Thousand Dollars ($300,000.00); Mr. Anderson testified that in his opinion a reasonable fee would be between Two Hundred Seventy-five Thousand Dollars ($275,000.00) and Three Hundred Thousand Dollars ($300,000.00); and Mr. Glenn testified that in his opinion a reasonable fee would be between Three Hundred Thousand Dollars ($300,000.00) and Three Hundred Fifty Thousand Dollars ($350,000.00). Both Mr. Graydon and Mr. Thomas, witnesses for Petitioner, testified that in their opinion a reasonable fee under the facts here would be Seventy-five Thousand Dollars ($75,000.00). It should be noted, based upon this expert testimony, that the maximum fee allowable by this Court would be the sum of Three Hundred Fifty Thousand Dollars ($350,000.00), while the minimum allowable fee would not be less than Seventy-five Thousand Dollars ($75,000.00)."

It is well settled that the amount of attorney's fees to be awarded to the wife's attorneys in this matter rested within the sound judicial discretion of the lower court and will not be disturbed on appeal unless an abuse thereof is shown.

In determining the amount of the fee, the court properly took into consideration "the nature, extent and difficulty of the services rendered; the time necessarily devoted to the case; the professional standing of counsel; the contingency of compensation; and the beneficial results accomplished." *Smith v. Smith,* 253 S. C. 350, 170 S. E. (2d) 650.

The trial judge properly concluded that no one of the above factors in itself was controlling but that consideration should be given to all in arriving at a reasonable fee. He accordingly rejected as unfair any attempt to set the fees on a contingent basis alone or solely on an hourly rate.

Certainly, in the exercise of its discretion, the lower court was not required to completely disregard, as of no probative value, the testimony of the witnesses who testified for respondent and to adopt the testimony of appellant's witnesses. Under this record, the exercise of discretion by the lower court cannot properly be so arbitrarily confined.

The award of the lower court was well within the range of the maximum and minimum evidence submitted by the expert witnesses; and was based upon findings, amply supported in the record, that the attorneys for the wife enjoy and deserve excellent professional reputations, the services performed were difficult, and the result obtained for the wife was the protection of an amount in excess of $1,500,000.00 if she lives twenty years. We find no abuse of discretion under this record.

The mere fact that this Court might set a smaller fee does not establish an abuse of discretion. As stated in 5A C. J. S., Appeal and Error, Section 1583(b), p. 35:

> "A reviewing court is never justified in substituting its discretion for that of the trial court; in determining whether the lower court has abused its discretion, the question is not whether the reviewing court agrees with the court below, but, rather, whether it believes that a judicial mind, in view of the relevant rules of law applicable to the particular case and on due consideration of all the circumstances, could reasonably have reached the conclusion of the court below, of which complaint is made."

Whether or not there was an abuse of discretion must be determined in the light of the facts and circumstances of the particular case. The term discretion involves the idea of a choice, and its exercise in this case turned largely upon factual considerations. Upon the basis of the con-

flicting evidence, the trial judge determined that a fee of $175,000.00 was reasonable. It is supported by the facts and, admittedly, by the opinions of experienced and capable attorneys. Before this Court is authorized to hold that the judgment of the lower court resulted from an abuse of discretion, there must be a showing by appellant that the conclusions reached were without reasonable factual support, resulted in prejudice to the right of the appellant, and therefore, in the circumstances, amounted to an error of law. *S. C. State Highway Dept. v. Sharpe,* 242 S. C. 397, 131 S. E. (2d) 257. There is no such showing in this case.

In his final exception, the husband contends that the lower court erred in directing that the attorneys' fees be paid directly to the attorneys. Code Section 20-112 provides that the court may allow the wife suit money. Counsel for the husband argues that an order granting payment directly to the attorneys is void. The wife's attorneys acknowledge ". . . that the preferred practice is to order attorneys' fees paid to the party, ..." Traditionally in this State, in divorce actions fees have been ordered paid directly to counsel. Normally, there is no reason to contest such payment and this Court is not aware of any evils growing out of the practice.

In the original order, the trial judge provided for "a reasonable attorneys' fee to be paid to her attorneys for defending the action." This apparently caused no concern on the first appeal, nor at the hearing on remand.

The principle is well settled that error is not reversible unless prejudice to the complaining party may have resulted therefrom.

Assuming error in directing that the fees be paid directly to the attorneys, no prejudice to the husband has been shown. The wife testified in the court below in behalf of the motion of her attorneys, whereby they sought payment and ". . . an order setting a reasonable attorneys' fee for the undersigned attorneys. . . ." Neither the husband nor the wife is in a position to complain, and a reversal on this ground is not required.

The judgment of the lower court is accordingly affirmed.

MOSS, C. J., and BUSSEY, A. J., concur. BRAILSFORD and LITTLEJOHN, JJ., concur and dissent.

LITTLEJOHN, A. J., (concurring and dissenting): I concur in the opinion of Mr. Justice Lewis except on one point. The husband submits that the lower court abused its discretion in directing him to pay counsel fees in the amount of $175,000.00 to the attorneys for the wife. In my view the fee is excessive such as to require the intervention of this Court and a reversal on this one issue.

The attorneys estimated the amount of time spent in the handling of this case. Based on these estimates the lower court found that they had spent in excess of 750 hours collectively. Accepting 750 hours as being correct, the fee amounts to $233.33 per hour per lawyer. If the number of hours spent on this case is more, the amount per hour would, of course, be correspondingly reduced.

The wife had much involved. She was justified in employing able counsel, which she did; counsel were justified in diligently pursuing the case, which they did. The writer of this dissent was the author of the opinion affirming the lower court in the case for the handling of which the husband must now pay attorneys' fees. The management of the case created difficulties and was troublesome only in the sense that the wife could have lost much. At the same time, the issues were not greatly complicated and the wife was clearly entitled to win, as held by the lower court and promptly affirmed by the unanimous vote of the members of this Court.

The attorneys are entitled to be paid by the husband, but the services rendered simply do not justify payment of $175,000.00.

I would reverse the lower court on this issue and either remand the case for reassessment of the fee or have this Court set the amount.

BRAILSFORD, A. J., concurs.

BRAILSFORD, A. J. (dissenting): I concur in the opinion of the majority except as to the amount awarded as attorney fees. As to that, I concur in Justice Littlejohn's dissent for the reasons stated by him and for the following additional reasons.

The testimony of Mrs. Witham's expert witnesses, the order appealed from and the brief all emphasize the concept that the exertions of esteemed and able counsel in the course of this litigation saved for Mrs. Witham in excess of $1,500,000.00, albeit payable in installments. While other factors were considered, the record brings conviction that this conception of the amount involved in the controversy and of the benefits resulting to Mrs. Witham dominated the evaluation by the expert witnesses and the court of the legal services furnished her. While benefit conferred by legal services is an important factor for consideration in fixing a fee to be paid by the benefited client, in all fairness, much less weight should be given to it when the fee is to be assessed against the client's adversary. But even if full weight be given to benefit conferred upon Mrs. Witham, as though the fee assessed would be paid by her, the conception of the amount of benefit as $1,500,000.00 is unsound.

In the first place, Mrs. Witham did not gain the right to these installment payments in this litigation, which merely preserved what was already her due. Nor does she get the money now. Instead, it is to be paid to her in installments over a period of sc[illegible] nineteen years, but only for so long as she lives. While there was no testimony as to the present value of the installments, common sense tells us that even without regard to the contingency of their accrual, such value is very substantially less than their sum.

There is another even more cogent reason why Mrs. Witham's expectancy was not worth nearly so much as the sum of the installments. We can be sure that the settlement was carefully drafted so that the annual installments would be deductible by Mr. Darden for tax purposes and reported by Mrs. Witham as income. The genesis of this ancillary litigation was information received by Mr.

Darden which suggested that installments paid after Mrs. Witham's remarriage might not be so deductible—an apprehension that was laid at rest by our earlier decision. The record furnishes no basis for a calculation of the tax impact on the annual installments. It is, however, common knowledge that the tax rate on income in this range would exceed 50%. Inevitably, the present value of Mrs. Witham's disposable income under the agreement would bear small resemblance to the sum of the installments, which was apparently regarded as the resulting benefit by Mrs. Witham's expert witnesses.

It is, of course, true that the amount of the fee was addressed to the discretion of the esteemed circuit judge (who will soon succeed the writer as a justice of this Court) and that the amount allowed was well within the range of the expert opinions. However, the expert testimony does not relieve us of our duty to examine the reasonableness of the fee in the light of the entire record and of our own comprehension of such matters. Having done so, I find nothing to justify a fee of more than that, in effect, assented to by Mr. Darden through his expert witnesses. I am convinced that the amount awarded resulted from an unrealistic estimate of the benefit conferred on Mrs. Witham and on over-emphasis of the importance of this factor in a case of this kind, both by the distinguished lawyers who testified as experts and by the court. I would modify the judgment appealed from by reducing the amount awarded to $75,000.00.

APPENDIX II

Satisfaction of Judgment

IN THE COURT OF COMMON PLEAS FOR
AIKEN COUNTY, SOUTH CAROLINA
COLGATE W. DARDEN, III, PETITIONER,

versus

ELIZABETH J. WITHAM, ET AL, RESPONDENTS

Now come Burns, McDonald, Bradford, Erwin & Patrick, attorneys for the Respondent Elizabeth J. Witham and her attorneys, Blatt, Fales, Peeples, Bedingfield & Loadholt and Henderson, Salley, Bodenheimer & Lynn, and certify that Judgment entered upon the 11th day of November, 1974 against Colgate W. Darden in favor of Elizabeth J. Witham and her attorneys, Blatt, Fales, Peeples, Bedingfield & Loadholt and Henderson, Salley, Bodenheimer & Lynn in the amount of ONE HUNDRED NINETY FIVE THOUSAND FOUR HUNDRED SEVENTY FIVE AND 00/100 ($195,475.00) DOLLARS has been paid in full and satisfied and the Clerk is authorized and requested to satisfy said Judgment of Record.